470.

SUPREME COURT OF THE UNITED STATES.

No. 73.

RICHARD SMITH, LESSEE OF JOHN LANNING, PLAINT.

VERSUS

JOHN VAUGHN, ET AL.

CERTIFICATE OF DIVISION IN OPINION, &C. FROM THE CIRCUIT COURT U. S. FOR THE DISTRICT OF PENNSYLVANIA.

Luzerne county, ss.

In pursuance of the annexed rule of the circuit court of the United States for the district of Pennsylvania, to take depositions of witnesses, personally appeared before the subscriber, president judge of the eleventh judicial district of Pennsylvania, Philander Stevens, a witness on the part of the plaintiff, who, being duly sworn, according to law, on his oath deposes and says, that he knows a part of the lands claimed by the plaintiff, situate upon the Lackawanna, in Luzerne county, the title to which has been disputed by some of the settlers; and has known them for four or five years past. That Samuel Ferris lives on part of said lands, and has resided on them ever since he had any knowledge of them. Alexander Dolph resides on said lands, and has resided thereon ever since his acquaintance with them. That John Vaughn, Timothy Stevens, Joseph Stevens, John Vaughn, jr., Moses Vaughn, Isaac Vaughn, Timothy Younglove, Platt Stevens, John G. Finch, and Benjamin Finch reside upon the said lands, and have presided thereon ever since I was acquainted with said lands, except Isaac Vaughn, Timothy Younglove, Joseph Stevens, and Timothy Stevens. That the said Isaac Vaughn has sold, as deponent understands, to Egbert B. Mott, and James Mott, who now resides on the land, and has removed to another place on said lands. That the said Timothy Younglove, Joseph Stevens, and Timothy Stevens have removed from said lands, as deponent understands. That the said Egbert Mott and James B. Mott have purchased and are now in possession of that part of the said lands formerly in possession of said Finches. And this deponent further says, that since the said Motts purchased and came into possession of the said lands, this deponent proposed purchasing the said land of the said Motts; and the course of the conversation, in relation to the said purchase, the said Egbert B. Mott informed this deponent that he had had conversation with Mr. Hollenback, in relation to the plaintiff's title, and intended to purchase it. And this deponent further says

that he understood from the said Isaac Vaughn, that he had given the Motts a judgment bond to indemnify them against the plaintiff's title to that part sold by him to said Motts, and the said Isaac Vaughn further informed this deponent that he intended to compromise with plaintiffs for their claim, as well on that part sold to said Motts as to that part in possession of said Isaac Vaughn claimed by plaintiffs. And this deponent further says that there has been no sale or change of possession by purchase among the settlers on the said disputed lands since his acquaintance with them, to his knowledge, except the purchases of the said Motts as before stated. The improvements upon the said lands, since deponent's acquaintance with them, have been very inconsiderable, except upon that part in possession of said Motts a storehouse has been erected. And this deponent further says that he knows where Alexander Dolph and Samuel Ferris resides; and from information obtained of George M. Hollenback, and on examination of a draft of the lands, he believes the said Alexander Dolph and Samuel Ferris reside on the lands in dispute. And this deponent further says that he at one time saw George M. Hollenback and Charles F. Welles, in the neighborhood of said lands; and he supposed they were there to attend to the interests under which they claimed. This deponent further says that he does not know any of the said lands by their warrantee names, nor the warrantee names of any of the lands on which the defendants or any of them are located.

PHILANDER STEPHENS.

Sworn and subscribed, this 9th day of October, 1833, before
DAVID SCOTT.

Personally appeared also William H. Alexander, a witness on the part of the said plaintiff, who, being duly sworn according to law, upon his oath deposes and says, that, in the month of September, 1831, he was present at the office of George M. Hollenback, in Wilkesbarre, when Isaac Vaughn and the said George M. Hollenback agreed upon the terms of compromise, in relation to that part of the lands in dispute sold by the said Isaac Vaughn to Egbert B. Mott and James Mott. The terms agreed upon were that the said Isaac Vaughn should pay five hundred dollars for the mill seat, twenty dollars per acre for the bottom land, and three dollars per acre for the upland. And this deponent understood that the said Motts were to have been present at the time of the said compromise, but they did not attend; and, in consequence of their not attending, the agreement was not carried into effect at that time. And this deponent further says that he does not know that the said Hollenback, Vaughn, and the Motts have since met together in relation to the subject. And this deponent further says, a letter, dated "Blakely, September 24th, 1831, signed by E. B. and J. Mott, and addressed to G. M. Hollenback," was received by this deponent during the absence of Mr. Hollenback, and answered by said deponent, as noted thereunder at the time; which said letter is hereto attached, and is now admitted by the said Egbert B. Mott to have been written by him. And this deponent further says that more than a year since he was with Charles F. Welles, esq., and assisted him in surveying a tract of land for William Ferris; and, whilst in the neighborhood, the said Welles called, with this deponent, at the house of Alexander Dolph, and also at the house of Samuel Ferris; and the said Welles conversed with the said Dolph and Ferris. The subject and import of the conversation he cannot recollect, but presumes it was in relation to the lands in dispute.

WM. H. ALEXANDER.

Sworn and subscribed, this 9th October, 1833, before
DAVID SCOTT.

Personally appeared also Noah Stevens, a witness on the part of the said plaintiffs, who being duly sworn according to law, on his oath deposes and says that he was a defendant in an ejectment brought by the same plaintiff at the same time and in the same court as the suits named in the annexed rule, and that he has compromised with the plaintiff, and obtained his title. And this deponent further says, that he has known the lands in dispute since the year seventeen hundred and ninety-three; that he knew Moses Dolph resided upon the said lands at the time that these ejectments were brought, and that the said Moses is since dead; and that Alexander Dolph resides upon the land formerly in possession of the said Moses Dolph, the father of the said Alexander. Samuel and John Ferris now resided where they did at the time of bringing said ejectments, and have continued to reside there ever since. And this deponent further says that no other person is in possession by purchase under said Dolph or Ferris, to his knowledge; and that no improvements have been made further than merely farming the improved land, and clearing some upon the said land for the last three years to deponent's knowledge. And this deponent further says that John Vaughn, John Secor, Isaac Vaughn, and Moses Vaughn now reside on the same tract on which they resided when these ejectments were brought. John Dale resides upon that part of the land formerly in possession of Calvin Cone. Egbert B. Mott and James Mott are in possession of that part of said land formerly in possession of Timothy Stevens, Oliver Stevens, and Joseph Stevens. John Vaughn and Isaac Vaughn now are in possession of that part of the said lands formerly in possession of John Vaughn, except a small part which deponent has heard Moses Vaughn say he claimed, which fell within the Ryerson survey. This deponent further says that he knows not what interest Timothy Younglove had in the lands in dispute, nor where he now resides. And that all the interest of the Finches in the land in dispute, he has understood has become vested in the Motts, who are now in possession. And this deponent further says that for the last three years no improvement has been made upon the Ryerson tract further than that of farming the improved land. The Motts have within three years repaired a grist mill, erected a storehouse, and are about building a saw mill. The storehouse is on the Finch possession. This deponent further says that Isaac Ferris, a son of Samuel Ferris, owns David Allen's interest in the lands in dispute, as he understands.

NOAH STEVENS.

Sworn and subscribed, this 9th October, 1833, before
DAVID SCOTT.

Questions by the defendant's counsel, Oristus Collins, Esq.

Question. How early were possessions made, and persons residing on the lands claimed by Moses Dolph, Samuel Ferris, and Timothy Stevens?

Answer. In 1793 there was a family on the posession of Moses Dolph, by the name of Ralph. The possession has been occupied ever since. My father, Timothy Stevens, moved on to the land in 1793, and continued in possession until three or four years since. The father of Samuel Ferris moved on the land five or six years after my father, and his son Samuel with him. He continued to reside upon the land till his death with his son; and his son Samuel now resides on the said land.

Question. With whom did you compromise for that part of the land in your possession?

Answer. With Judge Hollenback, who entered into an agreement to procure a deed from John Laning. I have since the death of Judge Hollenback obtained a deed of his son, George M. Hollenback.

Question. Have you any knowledge of Jacob Hart's surveying the lands in dispute?

Answer. I have no knowledge of Jacob Hart having made surveys on the lands in dispute, but from what I heard him say. He said he had surveyed; and I am pretty sure that I saw him have three warrants in his possession after the survey was made as he stated; one in the name of Timothy Stevens, one in the name of Solomon Bates, and the other in the name of James Conner. This in September, 1793. I afterwards saw marks of surveys upon the ground. I have since retraced the same lines with John Bennett, a surveyor. My father claimed and occupied the survey made in his name, until he sold out and parted with his interest in the land. I and my brother, John Stevens, compromised for the Bates survey. The Connors compromised for the Connor survey; and the Motts now are in possession of the Timothy Stevens survey.

The plaintiff's counsel object to the foregoing interrogatories and answers.

NOAH STEVENS.

Sworn and subscribed, this 9th October, 1833, before

DAVID SCOTT.

E. B. and J. Mott's letter concerning negotiations for the land they occupy, September 21th, 1831.

Dear Sir: It will suit us to be in Wilkesbarre with Mr. Vaughn, on Monday, the third of next month, to make arrangements respecting the lands we occupy. Please let us know if it will be convenient for you to attend to it at that time.

Yours respectfully,

E. B. & J. MOTT.

Mr. G. M. Hollenback.

Answered September 27th, by informing the Messrs. Motts, that Mr. Hollenback had gone on a journey, and was not expected home immediately; and that Mr. Welles was not here, and not expected here soon.

W. H. ALEXANDER.

John Caner, also a witness on the part of the plaintiffs, being duly sworn according to law, on his oath deposes and says, that a year ago this autumn he heard Egbert B. Mott say that he intended to purchase the right of soil, and was ready to compromise with Mr. Hollenback at any time. All he was waiting for was for Isaac Vaughn, whose other property was holden to secure this. Egbert B. Mott also said he intended to buy the right of soil of Hollenback for that part he bought of Finch. And this deponent further says that he heard George M. Hollenback this day offer to compromise with Isaac Vaughn upon the terms they had formerly talked of; and Vaughn said he would not. Egbert B. Mott was also present.

JOHN CANER.

Sworn and subscribed, this 9th October, 1833, before

DAVID SCOTT.

Be it remembered that to April session, one thousand eight hundred and fourteen, of the circuit court of the United States, in and for the third circuit and district of Pennsylvania, into the said court came Richard Smith, a citizen of the State of New York, lessee of John Laning, and impleaded John Saunders, a citizen of the State of Pennsylvania, in an action of ejectment, with notice to William Case, John Vaughn, Calvin Cone, Timothy Stevens, Oliver Stevens, Joseph Stevens, John Secor, and Timothy Stevens, jr. On the 14th April, 1814, Mr. Chauncey appeared for Case, Vaughn, T. Stevens, and Cone; and after various proceedings preparatory to trial, on the 15th October, 1821, a jury having been empannelled by agreement of the opposite parties, the term laid in the declaration was enlarged to seventeen years; whereupon, on the 17th October, 1821, a verdict for the plaintiff was rendered against Vaughn, Cone, Timothy Stevens, Oliver Stevens, Joseph Stevens, and Secor; and for the defendant's case and T. Stevens, jr. on which judgment nisi was entered.

And to October sessions, 1826, of the same court, a writ of scire facias issued and was returned at the suit of the same plaintiff, to revive the original judgment aforementioned against John Vaughn, Calvin Cone, Timothy Stevens, Oliver Stevens, Joseph Stevens, and John Secor terre-tenants, which was returned served on John Vaughn, Timothy Stevens, Joseph Stevens, and John Secor, also on John Vaughn, jr., Moses Vaughn, Isaac Vaughn, Timothy Younglove, Platt Stevens, John C. Finch, and Benjamin Finch, terre-tenants, nil habet, as to Calvin Cone and Oliver Stevens. On the 23d October, 1827, pleas of nul tiel record, and to the jurisdiction were filed; to which the plaintiff replies that he has such a record. On the 27th October, 1827, a rule was entered to show cause why the plea to the jurisdiction should not be struck off. On the 28th March, demurrer to the plea to the jurisdiction. On the 21st April, 1828, the rule to show cause why the plea to the jurisdiction should not be struck off was made absolute. On the 5th May, 1828, a rule was entered to show cause why the suit should not be dismissed for want of jurisdiction, and why a plea to the jurisdiction should not be admitted. And on the 6th May, 1828, said rules were discharged. On the 9th June, 1830, judgment was given for the plaintiff. On the 3d June, 1833, motion by plaintiff for leave to enlarge the term, and to issue habere facias possessionem; after which by order of court, sundry depositions hereto annexed were taken by order of court; and, on the 9th November, 1833, the plantiff, John Lanning's death was suggested on the record.

And to April session, 1834, of the same court, a writ of alias scire facias issued, and was returned at the suit of the same plaintiff, again to revive the original judgment against John Vaughn, Calvin Cone, Timothy Stevens, Oliver Stevens, Joseph Stevens and John Secor, and all other terre-tenants returned made known.

And upon the plaintiff's motion for leave to enlarge the term, and to issue a writ of habere facias possessionem, questions having occurred before the said circuit court upon which the opinions of the judges are opposed, to wit, whether leave should be granted to the plaintiff to enlarge the term, and to issue the said writ, the points upon which the disagreement has happened have during the same term, upon the plaintiff's request, been thus stated under the direction of the said judges, and certified under the seal of the said court to the Supreme Court at their next session, to be held hereafter, in order that it may by that court be finally decided, the said direction of the judges being accompanied with this opinion, that this is a collateral motion to amend depending on the discretion of the court under all the circumstances of the case, as they appear of record, or are disclosed by affidavits; and, in their opinion, does not come within the provisions of the act of 1802, (vol. 3, Laws United States, 482); but as